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In The
Supreme Court Of The United States
October Term, 2000

CADLEROCK PROPERTIES JOINT VENTURE, L.P.,
Petitioner
v.
COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE CONNECTICUT DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY

A. DEP Mischaracterizes The Essence Of Petitioner's Appeal By Attempting To Divert This Court's Attention From The Primary Issue.

At 8-9 of the Brief in Opposition to Petition for Writ for Certiorari (the "Brief"), DEP incorrectly asserts that Petitioner's appeal of the Connecticut Supreme Court's decision (the "Judgment") is based upon its misapplication of the equal protection standard for a claim of selective prosecution to the facts of the case. See Petition for Writ of Certiorari ("Petition") at i. It is abundantly clear, however, that the basis for this appeal is that the Connecticut Supreme Court affirmed the application of the wrong equal protection standard. This standard imposed a burden on Petitioner that exceeded the scope of the burden established under well-settled equal protection laws. See Petition at 8 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Armstrong, 517 U.S. 456 (1996)).

B. The Policy Of Deference To Agency Enforcement Decisions Does Not Allow DEP To Evade Equal Protection Law By Using Unbridled Discretion To Enforce The Law Arbitrarily And Capriciously.

DEP argues that there is a "policy of deference to the exercise of enforcement discretion by administrative agencies." See Brief at 7. Limiting this deference policy, however, is the well-settled notion that an agency's enforcement discretion "should not extend to the point where [the government] may operate with unbridled discretion . . . [or] by whim or caprice." See LeClair v. Saunders, 627 F.2d

606, 611 (2d Cir.1980). Here, DEP has acted with such 'unbridled discretion' as to arbitrarily and capriciously enforce its laws against Petitioner. See Petition at 4-5, 16. Therefore, DEP has violated the very principle it espouses. More importantly, DEP proffers the "policy of deference" to this Court as a red herring in order for DEP to evade equal protection law.[1]

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[1]There is generally a presumption of regularity in an agency's enforcement decisions. See Armstrong, 517 U.S. at 464. Any presumption of regularity, however, in DEP's enforcement decision regarding Petitioner was put in question by the evidence that DEP had obtained a confession from a prior polluter of the Site, Benjamin Schilberg, ("Schilberg"), but refrained from issuing an abatement order against him. See Petition at 4. The presumption was shattered by the testimony of Shilberg's son, Bernard Schilberg, (the "Son"), who said that at the time DEP refused to pursue Schilberg, he was serving as a member of Connecticut's Underground Storage Tank Petroleum Cleanup Account Review Board (the "UST Board"), from which position he had cultivated personal relationships with many influential people within the DEP. See Petition at 5; see also App. at A101-A106. For Petitioner to obtain a confession from DEP admitting that the agency chose not to pursue Schilberg because of his Son's political connections would be next to impossible. A high DEP official's own statement that DEP's obtainment of the Schilberg confession was exceptionally unusual and difficult to obtain flies in the face of the rigorous and unfair standard proposed by DEP. See Transcript, dated December 3, 1997, at p. 87, lines 22-24; p. 88, lines 1-4; p. 89, lines 5-20.

Schilberg's written confession, when coupled with the Son's testimony, is clear evidence that gives this Court a reason to question the presumption that DEP's enforcement decision was proper. For this reason, this Court should review the enforcement decision of the DEP.

C. DEP's Failure To Distinguish The Legal Principles Enunciated In *Esmail*, *Dartmouth*, And *Klinger* Demonstrates The Obvious Conflict Between The Equal Protection Standard Applied By Those Courts And The Standard Applied In The Judgment.

DEP's devotion of five pages of its brief to distinguish the facts of Esmail v. Macrane,[2] The Dartmouth Review v. Dartmouth College,[3] and Klinger v. Department of Corrections[4] from the facts involved in the case at hand marks an attempt to distract the Court from the legal principles for which these cases were cited by Petitioner. See Brief at 16-20. Those legal principles are squarely at odds with the Judgment. In order to make an equal protection claim of selective prosecution, the Connecticut Supreme Court required Petitioner to show that it was identical in every respect to a confessed polluter and a prior owner believed to have been a polluter. See Petition at A12-A13. Consequently, the Judgment held that the only party to whom Petitioner could have been identical in every respect was a current, non-polluting property owner. See id.

Under the analysis set forth in the Judgment, Petitioner could only have been a victim of selective prosecution with regard to DEP's issuance of an abatement order if Petitioner jointly owned the property with another non-polluting party who was not required by DEP to clean up

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[2]53 F.3d 176, 179 (7th Cir.1995).

[3]889 F.2d 13, 19 (1st Cir.1989).

[4]31 F.3d 727, 731 (8th Cir.1994).

the Site. The First, Seventh and Eighth Circuits, in Esmail, Dartmouth and Klinger, however, hold that a victim of selective prosecution need not establish that it was identical in all aspects to those whom the victim claims were treated more favorably but, rather, that the victim was identical to those who were treated more favorably in all relevant aspects. See Petition at 8-12.

As Petitioner fully explicated in the Petition, it compared itself to a confessed polluter and a prior owner believed to have been a polluter, both of which parties were similarly situated to Petitioner in all relevant aspects because they were subject to the same government action. See Klinger, 31 F.3d at 731(relevant aspects include "whether the plaintiffs are similarly situated to another group for purposes of the challenged government action").

D. For The First Time In The Adjudication Of This Matter, DEP Acknowledges This Court's Long-Established Law: A Claim Of Equal Protection Can Be Established By A Showing Of Arbitrary State Action, Thereby Obviating Petitioner's Need To Show Any Malicious Or Bad-Faith Intent By DEP To Injure Petitioner.

One of the bases for this appeal is the Connecticut Supreme Court's failure to recognize that the second prong of a claim of selective prosecution can be satisfied by a showing of arbitrary enforcement of the laws by a state agency. Indeed, even DEP now admits that an arbitrary classification may constitute an appropriate element of a claim for selective prosecution. See 14-15 of the Brief (citing Oyler and Armstrong). DEP appears to further concede that only an allegation of discrimination that is not

based upon an unjustifiable classification must be proven by showing a malicious or bad-faith intent to injure Petitioner. Id. at 14-15.[5]

This Court should therefore reverse the Judgment because the Connecticut Supreme Court erroneously upheld the trial court's affirmation of the hearing officer's decision, rather than reversing the decision and applying the arbitrary state action standard.

E. DEP's Explication Of *Wayte* And Its Impact Is Incomplete. Moreover, Contrary To DEP's Assertions, *Wayte* Supports Petitioner's Claim That A State's Application Of An Arbitrary Classification Does Satisfy The Second Prong Of A Claim Of Selective Prosecution.

DEP would like this Court to embrace the notion that an administrative agency's enforcement discretion is so sweeping that there is no place for its review in the court system. See Brief at 10. In furtherance of this objective, DEP lifts a single quotation from the text of this Court's decision in Wayte v. United States and gives it a life of its own: "This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Wayte, 470 U.S. 598, 607 (1985). Concealed from this Court's view is the fact that the Wayte Court qualified this prefatory remark:

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[5]Even if this point is not conceded by DEP in the Brief, the fact that arbitrary state action is contemplated as an unjustifiable classification for equal protection purposes has already been addressed fully in the Petition and authorities cited therein. See Petition at 12-16.

> [A]lthough prosecutorial discretion is broad, it is not unfettered. Selectivity in the enforcement of criminal laws is subject to constitutional constraints. In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.

Id. at 608 (internal citations omitted; internal quotations omitted; emphasis added).

Because Petitioner has asserted a selective prosecution claim based upon arbitrary state action, the general tendency of appellate courts to defer to agency decision making does not immunize DEP from this Court's review of DEP's decision. In that decision, DEP issued an abatement order against Petitioner to the exclusion of a confessed polluter of the Site who had political ties to DEP and whom DEP has readily admitted could have been joined in the Order issued. See Petition at 4-5.

Try as DEP might,[6] they cannot harmonize the equal protection standards set forth by the Wayte Court with those applied in the Judgment.[7] While the Wayte Court did hold that the second prong of a defendant's claim of selective prosecution based on equal protection must be proven by showing that the government's selection was

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[6]Brief at 11.

[7]DEP's reliance upon Snowden v. Hughes, 321 U.S. 1 (1944), at 15 of the Brief is also misplaced given the fact that this case did not involve an equal protection claim.

based on impermissible grounds such as race, religion, or the exercise of First Amendment rights, the trial court in Wayte applied this standard under a set of facts remarkably dissimilar to those in this case. The Wayte case involved a petitioner's right to speak out against his country (i.e., a First Amendment right) by not registering with the Selective Service. Id. at 600-603. In affirming the lower court's requirement in Wayte of proving government selectivity based upon race, religion or the exercise of First Amendment rights, this Court made it plain that, in the larger context of cases, "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Id. at 608 (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

DEP is also quick to state that the Wayte Court ultimately rejected the petitioner's claim of selective prosecution. DEP fails to mention, however, that the Court of Appeals for the Ninth Circuit found legitimate explanations for the government's enforcement system: the identities of the individuals situated similarly to the plaintiff were unknown and the petitioner had expressed his wilful intent to violate the law. Id. at 606.

In stark contrast to the facts of the Wayte case, DEP did not offer any plausible explanation for its failure to issue an order against Schilberg to clean up the contamination for which he readily admitted he was responsible. While DEP claimed that the joinder of a non-polluting owner and polluter of the site would tend to complicate the administrative proceedings, DEP could not point to a single example of the "complications" that would allegedly ensue. DEP further admitted that a polluter and a

non-polluting site owner could be held jointly and severally liable under Connecticut law. See Petition at A55, n.15.

F. Despite The Well-Settled Rule That A Party To An Appeal May Not Refer To Facts Outside Of The Record, DEP Attempts To Attach Significance To The Political Parties Of Two Elected Officials Whose Party Affiliations Were Never Made A Part Of The Record.

At 4 and 5 of the Brief, DEP attempts to attribute some talismanic significance to the party affiliations of the two elected officials who, respectively, appointed the Son and the DEP Commissioner's designee to the UST Board. It is a well-established rule that when setting forth the facts in a brief on appeal, the appellant and appellee are confined to the testimony or other evidence introduced at the trial and that evidence must be material to the issues on appeal. See Connecticut P.B. § 67-1. The statement of facts must also be supported by appropriate references to the page or pages of the transcript or to the document upon which it relies. See Connecticut P.B. § 67-4; Fed.R.App.P. 28 and 30.

DEP states that the Democratic Speaker of the Connecticut House of Representatives appointed the Son to the UST Board and cites to the Appendix at A12-A13 as authority for this proposition. Brief at 4-5. The Appendix at A12-A13, however, makes no reference to the alleged fact that the Son was appointed by a Democrat. DEP also claims that a Republican Governor appointed the DEP Commissioner whose designee on the UST Board was Richard Barlow. Brief at 5. DEP does not cite to any part of

the record in support of these assertions because they are not contained in the record.

DEP's inappropriate effort to inject facts into this appeal that were never made part of the record illustrates the length to which DEP will go to justify an enforcement pattern that was obviously the result of political bias. The DEP pursued a property owner that did not create any contamination at the Site at the same time that it elected not to issue an abatement order against a confessed polluter whose son served on a DEP advisory board. DEP's enforcement action and inaction with regard to the Site, at the very least, raises the specter of favorable treatment of a known polluter with a relationship with that agency at the expense of a nonpolluter without such a relationship. See Appendix at A22; see also U.S. v. Mississippi Valley Generating Co., 364 U.S. 520, 562 (1961)(noting that public's trust in its government "is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption").

In view of DEP's failure to reconcile the Judgment with well-settled equal protection principles enunciated by this Court and by several United States Courts of Appeals, the Petition should be granted.

CONCLUSION

For all of the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully Submitted,

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